

U.S. DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DISTRICT

JAMES G. ABOUREZK,
ROXANNE DUNBAR-ORTIZ, and
JANE FONDA,

Plaintiffs,

v.

PROBUSH.COM, INC., a Pennsylvania
corporation,
MICHAEL MARINO, an individual, and
BENJAMIN MARINO, an individual,

Defendants.

Civil Action No. 03-4146

**PLAINTIFFS' STATEMENT
OF
UNDISPUTED FACTS IN
SUPPORT OF THEIR
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

COMES NOW the Plaintiffs, by and through their attorney of record, with
this Plaintiffs' Statement of Undisputed Facts in Support of Its Motion for Partial
Summary Judgment.¹

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

The Plaintiffs argue that the following facts are undisputed in this matter.

1. The Defendants own and operate a website called probush.com,
located at <http://www.probush.com>. *See Exhibit 1*, page 1, lines 19-23, a true and
correct copy of a transcript of Defendant Benjamin Marino's appearance on the

¹ Opposing counsel has graciously waived objections for lack of timeliness for filing
Plaintiff's motion for partial summary judgment. *See Exhibit 14*, a true and correct copy of
email from Attorney Ron Parsons to Attorney Todd Epp, July 6, 2005, attached hereto and
incorporated herein.

South Dakota Public Radio program "South Dakota Forum," attached hereto and incorporated herein.

2. The Defendants' website is registered by GoDaddy. *See Exhibit 2*, page 26, lines 15-16, a true and correct copy of Deposition of Benjamin Marino, January 19, 2005, attached hereto and incorporated herein; *see also Exhibit 3*, pages 12-33, lines 25-1, a true and correct copy of Deposition of Michael Marino, January 19, 2005, attached hereto and incorporated herein; and *Exhibit 4*, a true and correct copy of WHOIS search, conducted April 28, 2003, attached hereto and incorporated herein.

3. Defendant Probush.com, Inc. is a Pennsylvania for profit corporation, with a post office box in West Point, PA, and operating out of Defendants Michael and Benjamin Marino's home in North Wales, PA. *See Exhibit 1*, page 22, lines 1-2, Defendant Benjamin Marino's appearance on the South Dakota Public Radio; *see also Exhibit 3*, pages 9-10, lines 17-3, Deposition of Michael Marino; *see also Exhibit 5*, Answer #1, Defendants' Answers to Plaintiff's Interrogatories; and *Exhibit 6*, a true and correct copy of "General Name Search" on Pennsylvania Department of State website, search performed May 31, 2003, attached hereto and incorporated herein.

4. Defendants Michael and Benjamin Marino are the officers of probush.com, Inc., with Michael the president and Benjamin the CFO or COO. *See*

Exhibit 2, page 13, lines 17-24, Deposition of Benjamin Marino; *see also Exhibit 5*, Answer #1, Defendants' Answers to Plaintiff's Interrogatories.

5. Defendants Michael Marino and Benjamin Marino are responsible for the material on the probush.com website. *See Exhibit 2*, page 29, lines 7-13, Deposition of Benjamin Marino.

6. Benjamin Marino is a resident of North Wales, PA. *See Exhibit 5*, Answer #3, Defendants' Answers to Plaintiff's Interrogatories.

7. Michael Marino is a resident of North Wales, PA. *See Exhibit 5*, Answer #2, Defendants' Answers to Plaintiff's Interrogatories.

8. A portion of the Defendants' website had a section called "Traitors List," listing the Plaintiffs and a number of prominent Americans as traitors to the United States. *See Exhibit 7*, a true and correct copy of Defendants' probush.com website archived from April 7, 2003, accessed January 9, 2005, attached hereto and incorporated herein.

9. The probush.com website also contains a "Patriot List" that claims, "If you do support our President's decision you are a patriot to our country." *See Exhibit 16*, a true and correct copy of probush.com website pages, accessed January 17, 2005, attached hereto and incorporated herein.

10. The probush.com website made its first appearance on the internet on or about September 5, 2002. *See Exhibit 8*, a true and correct copy of WayBack Machine, attached hereto in incorporated herein.

11. The probush.com website called Plaintiffs James Abourezk, Roxanne Dunbar-Ortiz, and Jane Fonda traitors to the United States. *See* Amended Verified Complaint; *see also Exhibit 7*, copy of the "Traitors List" of the probush.com website.

12. Plaintiff Abourezk is a former U.S. Representative and U.S. Senator from South Dakota, a U.S. Navy veteran, and an attorney admitted to practice in South Dakota and the District of Columbia. *See* Amended Verified Complaint.

13. Plaintiff Abourezk is a resident of Sioux Falls, SD. *See* Amended Verified Complaint.

14. Plaintiff Dunbar-Ortiz is a women's rights activist. *See* Amended Verified Complaint.

15. Plaintiff Dunbar-Ortiz is a resident of San Francisco, CA. *See* Amended Verified Complaint.

16. Plaintiff Fonda is an actress. *See* Amended Verified Complaint.

17. Plaintiff Fonda is a resident of Atlanta, GA. *See* Amended Verified Complaint.

18. On the South Dakota Public Radio program "South Dakota Forum," Defendant Benjamin Marino admitted that he and his brother, Defendant Michael Marino, knew that the Plaintiffs and the other members of their "Traitors List" did not engage in traitorous activity. *See Exhibit 1*, page 2, lines 16-18, Benjamin Marino's appearance on South Dakota Public Radio.

19. The Defendants sell merchandise from the probush.com site. *See Exhibit 1*, pages 3-4, lines 19-3, a true and correct copy of the transcript of Defendant Benjamin Marino's appearance on South Dakota Public Radio's program, "South Dakota Forum," attached hereto and incorporated herein; *see also Exhibit 2*, page 26, lines 1-4, Deposition of Benjamin Marino; *see also Exhibit 9*, a true and correct copy of Order Report from cafepress.com (provided by the Defendants) concerning website orders of merchandise on probush.com, attached hereto and incorporated herein; *and Exhibit 3*, page 53, lines 7-13, Deposition of Michael Marino.

20. Defendant Benjamin Marino called the Plaintiffs and other members of the probush.com "Traitors List" "enemies of the President (George W. Bush)." *See Exhibit 1*, page 4, lines 20-23, Defendant Benjamin Marino's appearance on South Dakota Public Radio.

21. The Defendants based placing Plaintiff Abourezk on the "Traitors List" because of his signature to the "Not in Our Name" petition and not because of any traitorous behavior or criminal conduct on Plaintiff Abourezk's part. *See Exhibit 1*, pages 5-6, lines 19-23, Defendant Benjamin Marino's appearance on South Dakota Public Radio; *see also Exhibit 15*, a true and correct copy of the "Not In Our Name" petition against the Iraq War that Plaintiff Abourezk signed.

22. Defendants Benjamin Marino and Michael Marino admit that Plaintiffs Dunbar-Ortiz and Fonda were placed on the "Traitors List" simply

because they signed the "Not In Our Name" petition against the Iraq War. *See Exhibit 2*, page 49, lines 9-14, Deposition of Benjamin Marino; *see also Exhibit 3*, page 54, lines 13-16, Deposition of Michael Marino; *and Exhibit 15*, Not In Our Name petition.

23. Defendant Michael Marino admitted that Plaintiffs Dunbar-Ortiz and Fonda, to his knowledge, had not committed any traitorous acts. *See Exhibit 3*, page 54, lines 17-19, Deposition of Michael Marino.

24. The Defendants knew of no traitorous acts by Plaintiff Abourezk. *See Exhibit 2*, page 36, lines 15-25, Deposition of Benjamin Marino.

25. Defendant Benjamin Marino admits that use of the term "traitor" was a "strong word." *See Exhibit 1*, page 9, lines 5-7, Defendant Benjamin Marino's appearance on South Dakota Public Radio.

26. Defendant Benjamin Marino admitted that Plaintiff Abourezk is not a traitor to the United States. *See Exhibit 1*, page 10, lines 15-24, Defendant Benjamin Marino's appearance on South Dakota Public Radio; *see also Exhibit 2*, pages 31-2, lines 12-2, Deposition of Benjamin Marino.

27. Defendant Michael Marino admitted that Plaintiff Abourezk has not been a traitor. *See Exhibit 2*, page 29, lines 4-7, Deposition of Benjamin Marino.

28. Defendant Michael Marino admitted he had done no research on whether Plaintiff Abourezk was a "traitor" to the United States prior to placing him

on the probush.com "Traitors List." *See Exhibit 2*, pages 29-31, lines 23-3, Deposition of Benjamin Marino.

29. Defendant Benjamin Marino admitted that he did no research on the individuals named to the probush.com "Traitors List" and knows of no research Defendant Michael Marino performed concerning the individuals, including the Plaintiffs, named on the website as traitors. *See Exhibit 2*, page 30, lines 14-19, and page 54, lines 9-12, Deposition of Benjamin Marino.

30. The Defendants claim the "Traitors List" on probush.com is a parody or satire. (Plaintiffs do not agree that the site is a parody or satire and do not admit such; they simply present the fact that the Defendants believe their "Traitors List" is a satire or a parody.) *See Exhibit 2*, page 33-35, lines 15-15, Deposition of Benjamin Marino; *see also Exhibit 3*, page 34, lines 8-10, Deposition of Michael Marino.

31. The Defendants did not believe that the signers of the "Not In Our Name" petition were committing treason. *See Exhibit 2*, page 36, lines 12-14, Deposition of Benjamin Marino.

32. Defendant Benjamin Marino looked at the probush.com website as a business opportunity. *See Exhibit 2*, page 44, lines 10-14, Deposition of Benjamin Marino; *see also Exhibit 9*, a true and correct copy of an Order Report for goods sold through probush.com from cafepress.com, attached hereto and incorporated herein.

33. Defendant Benjamin Marino believes in "stern patriotism." *See Exhibit 2*, page 45, lines 4-17, Deposition of Benjamin Marino.

34. The Defendants say there was a disclaimer at the bottom of the last page (page 24 of 24) of the original "Traitors List." (Plaintiffs do not admit to the truth of this assertion, only that the Defendants are asserting such a statement.) *See Exhibit 2*, page 49, lines 15-20, Deposition of Benjamin Marino; *see also Exhibit 3*, pages 58-9, lines 9-4, Deposition of Michael Marino; and *Exhibit 7*, probush.com website.

35. Defendant Michael Marino said that the first disclaimer on the "Traitor List" read, "Parody not to be taken seriously. These traitors are not legal traitors of the United States, though we wish they were." *See Exhibit 3*, page 60, lines 2-5, Deposition of Michael Marino.

36. Defendant Michael Marino said that the "Traitor List" disclaimer was moved to the front of the website after the instigation of this lawsuit. *See Exhibit 3*, page 59, lines 5-11, Deposition of Michael Marino; *see also Exhibit 10*, a true and correct copy of a "screen shot" of the site, attached hereto and incorporated herein.

37. Defendant Michael Marino admitted that "famous people" were chosen for the probush.com "Traitors List" to help drive traffic to probush.com. *See Exhibit 3*, pages 17-18, lines 17-19, Deposition of Michael Marino.

38. Defendant Michael Marino said the disclaimer noted above in #35 was changed to "Parody not to be taken seriously. These traitors are not legal

traitors of the United States." (Again, the Plaintiffs do not admit the truth of this assertion, only that the Defendants are making it.) This change was made after the institution of this lawsuit. *See Exhibit 3*, page 60, lines 6-9, Deposition of Michael Marino *see also Exhibit 7*, probush.com website.

39. Defendant Michael Marino admitted that the Defendants placed the "Traitors List" on probush.com in order to stifle criticism of President George W. Bush and to back off critics of President Bush by calling them traitors. *See Exhibit 3*, page 33, lines 13-24, Deposition of Michael Marino.

40. Defendant Michael Marino admitted that he knew Plaintiff Abourezk has never been a traitor to the United States. *See Exhibit 3*, page 40, lines 2-7, and lines 18-21, Deposition of Michael Marino.

41. Defendant Michael Marino admitted that he did not know whether the accusation of calling Plaintiff Abourezk a traitor constituted any fact or facts about Plaintiff Abourezk. *See Exhibit 3*, page 64, lines 12-22, Deposition of Michael Marino.

42. Defendant Michael Marino admitted that the "Traitors List" was not factual. *See Exhibit 3*, page 65, lines 2-3, Deposition of Michael Marino.

43. The Defendants have applied for or received a trademark registration for the term "Traitors List." *See Exhibit 3*, page 73, lines 16-18, Deposition of Michael Marino.

44. Defendants do not believe that Plaintiff Abourezk is guilty of any crime. *See Exhibit 5*, Answer #17, Defendants' Answers to Plaintiff's Interrogatories.

45. Defendants do not believe that Plaintiff Dunbar-Ortiz is guilty of any crime. *See Exhibit 5*, Answer #18, Defendants' Answers to Plaintiff's Interrogatories.

46. Defendants do not believe that Plaintiff Dunbar-Ortiz is guilty of any crime. *See Exhibit 5*, Answer #19, Defendants' Answers to Plaintiff's Interrogatories.

47. Plaintiff James Abourezk was "angered, outraged, surprised" when he first accessed probush.com and saw that he was named to the "Traitor's List." *See Exhibit 11*, page 7, line 1, a true and correct copy of Deposition of James Abourezk's, January 18, 2005, attached hereto and incorporated herein.

48. Upon viewing the "Traitor's List" on probush.com, Plaintiff Abourezk did not think the other people so named were traitors. *See Exhibit 11*, page 7, line 20, Deposition of James Abourezk.

49. Upon his first viewing of the probush.com website and the "Traitors List," Plaintiff Abourezk did not recall seeing any disclaimer. *See Exhibit 11*, page 8, lines 9-12, Deposition of James Abourezk.

50. Plaintiff Abourezk has never been accused or convicted of the crime of treason by any state or the United States of America. *See Exhibit 11*, page 17, lines 12-16, and pages 55-56, lines 25-3, Deposition of James Abourezk.

51. Plaintiff Abourezk believes that his placement on the probush.com "Traitors List" impugned his patriotism. *See Exhibit 11*, page 35-36, lines 24-6, Deposition of James Abourezk.

52. The original "disclaimer" for the "Traitors List" on probush.com was at the end of the page and had to be clicked to be accessed. *See Exhibit 7*, page 24 of probush.com website from April 7, 2003. After the prosecution of this lawsuit by the Plaintiffs, the "disclaimer" was moved to the top of the "Traitors List" page and readable without going to another link. *See also Exhibit 10*, screen shot of probush.com site; *and Exhibit 12*, page 1 of probush.com website from January 17, 2005.

Dated this 6th day of July, 2005.

Todd D. Epp Law Office, PLLC

/s/ Todd D. Epp

Todd D. Epp, Esq.
610 S. Grand Ave.
Harrisburg, SD 57032-2008
(o) 605.767.5531 (f) 309.213.3884
(email) toddepp5531@msn.com

Attorney for Plaintiffs

EXHIBIT LIST

EXHIBIT #	Exhibit Description
1	Transcript of Defendant Benjamin Marino's appearance on SD Public Radio's "South Dakota Forum" program.
2	Excerpts of transcript of deposition of Defendant Benjamin Marino.
3	Excerpts of transcript of deposition of Defendant Michael Marino.
4	WHOIS search, April 28, 2003.
5	Defendants' Answers to Plaintiffs' Interrogatories.
6	General name search on Pa. Dept. of State website, May 31, 2003.
7	Defendants' website, probush.com, archived from April 7, 2003, accessed from web.archive.org on January 9, 2005.
8	Wayback Machine search of probush.com's history.
9	Order Report from cafepress.com.
10	Screen Shot of probush.com site.
11	Excerpts of Deposition of James G. Abourezk.
12	Defendants' website, probush.com, page 1, from Jan. 17, 2005.
13	Probush.com webpage to purchase space as a "Traitor" and FAQs
14	Emails from Attorneys Todd Epp and Ron Parsons, July 6, 2005.
15	"Not In Our Name" petition (online version) signed by Plaintiff James Abourezk.
16	"Patriot List" from probush.com, accessed Jan. 17, 2005.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing pleading was filed via the District of South Dakota's CM/ECF system and sent via email on the 6th day of July, 2005, to:

Ronald Parsons, Jr.
Johnson, Heidepriem, Miner, Marlow & Janklow, LLP
PO Box 1107
Sioux Falls, SD 57101-1107
(email) ron@jhmmj.com

Attorney for Defendants

/s/ Todd D. Epp
Todd D. Epp